

ASSEMBLY BILL

No. 941

Introduced by Assembly Member Canciamilla

February 18, 2005

An act to add Title 8 (commencing with Section 945.6) to Part 2 of Division 2 of the Civil Code, relating to construction defects.

LEGISLATIVE COUNSEL'S DIGEST

AB 941, as introduced, Canciamilla. Construction defects: prelitigation procedure.

Existing law, applicable to residences originally sold on or after January 1, 2003, specifies the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed prelitigation procedure, and the obligations of the homeowner.

This bill would establish a similar, but separate, prelitigation procedure applicable to claims of construction defects in residential construction not otherwise subject to the above provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Title 8 (commencing with Section 945.6) is
- 2 added to Part 2 of Division 2 of the Civil Code, to read:

1 TITLE 8. PRELITIGATION PROCEDURE: RESIDENTIAL
2 CONSTRUCTION NOT SUBJECT TO TITLE 7

3
4 945.6. Prior to filing any action on or after January 1, 2006,
5 for claims not subject to Title 7 (commencing with Section 895)
6 that seek recovery of damages arising out of, or related to
7 deficiencies in, the residential construction, design,
8 specifications, surveying, planning, supervision, testing,
9 observation of construction, or the design or manufacture of a
10 component part installed in the original construction of an
11 individual dwelling unit or common area, a claimant or
12 homeowner shall follow the prelitigation procedure provided in
13 this title.

14 945.7. (a) The claimant shall provide written notice via
15 certified mail, overnight mail, or personal delivery to the builder,
16 in the manner prescribed in this section, of the claimant's claim
17 that the construction of his or her residence contains a defect.
18 The builder shall be notified through the agent provided on the
19 Secretary of State's Web site or office. That notice shall provide
20 the claimant's name, address, and preferred method of contact,
21 and shall state that the claimant alleges a defect pursuant to this
22 title, and shall describe the claim in reasonable detail sufficient to
23 determine the nature and location, to the extent known, of the
24 claimed defect and damages resulting from each defect. In the
25 case of a group of homeowners or an association, the notice shall
26 identify the claimants by address, name, and if necessary, other
27 description sufficient to apprise the builder of the locations of the
28 subject residences in addition to the defect descriptions and other
29 requirements set forth above. That document shall have the same
30 force and effect as a notice of commencement of a legal
31 proceeding.

32 (b) The notice requirements of this section do not preclude a
33 claimant from seeking redress through any applicable normal
34 customer service procedure as set forth in any contract, warranty,
35 or any other builder-generated document. If a claimant seeks to
36 do so, that request does not satisfy the notice requirements of this
37 section.

38 (c) The claimant shall not be deemed to have satisfied the
39 notice requirements of this title unless subdivision (a) is satisfied
40 for each claimed defect and each unit, if there is more than one

1 unit, and no statute of limitations that may be applicable to the
2 claim may be tolled or extended until those requirements are
3 satisfied.

4 945.8. (a) For purposes of this title, “builder” means a person
5 or entity who was the original seller, or the successor entity to the
6 original seller and, at the time of sale, was in the business of
7 selling residential dwelling units to the public.

8 (b) For purposes of this title, “claimant” has the same meaning
9 as that provided in subdivision (f) of Section 895, but does not
10 include the builder.

11 (c) For purposes of this title, “action” means any civil lawsuit,
12 judicial action, judicial reference, arbitration proceeding, or
13 alternative dispute resolution proceeding.

14 (d) For purposes of this title, “potentially responsible party”
15 includes any subcontractor, design professional, or general
16 contractor.

17 945.9. A builder or his or her representative shall
18 acknowledge, in writing, receipt of the notice of the claim within
19 14 days after receipt of the notice of the claim. In the
20 acknowledgment, the builder shall indicate whether or not the
21 builder elects to follow the prelitigation procedure provided in
22 this title. To the extent that provisions of this title are enforced
23 and those provisions are substantially similar to provisions in
24 Section 1375, but an action is subsequently commenced under
25 Section 1375, the parties are excused from performing the
26 substantially similar requirements under Section 1375. If the
27 builder elects not to follow the prelitigation procedures provided
28 in this title, this title is of no further force or effect, and nothing
29 herein applies to, or in any way affects, the builder’s or
30 claimant’s rights, remedies, obligations, or defenses, contractual
31 or legal. Failure to indicate whether or not the builder elects to
32 follow the prelitigation procedure provided in this title shall be
33 deemed builder’s election not to follow the prelitigation
34 procedure provided in this title. If the builder elects to use the
35 prelitigation procedures set forth in this title, the election is
36 binding.

37 945.10. (a) Within 30 days after service of the notice of claim
38 by claimant required pursuant to Section 945.7, a builder who
39 has received the notice of claim and has elected to follow the
40 prelitigation procedures provided in this title may send the

1 claimant a written response to the claim or claims that either (1)
2 offers to settle the claim by monetary payment, the making of
3 repairs, or a combination of both, without inspection, or (2)
4 proposes to inspect the dwelling that is the subject of the claim.

5 (b) If a builder who has elected to follow the prelitigation
6 procedures provided in this title wholly rejects the claim and will
7 neither remedy the alleged construction defect nor settle the
8 claim, the claimant may bring an action against the builder for
9 the claims described in the notice of claim without further notice
10 except as otherwise provided under applicable contract or law.

11 (c) If the claimant rejects the settlement offer made by the
12 builder, the claimant shall provide written notice of the
13 claimant's rejection to the builder. The notice shall include the
14 reasons for the claimant's rejection of the builder's proposal or
15 offer. If the claimant believes that the settlement offer either (1)
16 omits reference to any portion of the claim, or (2) was
17 unreasonable in any manner, the claimant shall, in the written
18 notice of rejection, include those items the claimant believes
19 were omitted and set forth in detail all reasons why the claimant
20 believes the settlement offer is unreasonable.

21 (d) If a proposal for inspection is made pursuant to subdivision
22 (a), the claimant shall, within 60 days of receiving the builder's
23 proposal, provide the builder and its subcontractors, agents,
24 experts, and consultants prompt and complete access to the
25 dwelling at a mutually convenient date and time to conduct the
26 initial inspection of the dwelling, document any alleged
27 construction defects, and perform any destructive or
28 nondestructive testing required to fully and completely evaluate
29 the nature, extent, and cause of the claimed defects and the nature
30 and extent of any repairs or replacements that may be necessary
31 to remedy the alleged defects. If destructive testing is required,
32 the builder shall give the claimant advance notice of the testing
33 and shall, after completion of the testing, return the dwelling to
34 its pretesting condition within 48 hours of completion of the
35 testing. If a builder deems a second inspection or testing
36 reasonably necessary, the builder shall provide notice to the
37 claimant within 10 days following the completion of the initial
38 inspection. The builder and any other potentially responsible
39 party may jointly conduct a second inspection or testing. A
40 second inspection or testing shall be completed within 40 days of

1 the initial inspection or testing. All requirements concerning the
2 initial inspection or testing shall also apply to the second
3 inspection or testing. If a claim is asserted on behalf of owners of
4 multiple dwellings, or multiple owners of units within a
5 multifamily complex, then the builder shall be entitled to inspect
6 each of the dwellings or units. All costs of builder inspection and
7 testing, including any damage caused by the builder inspection,
8 shall be borne by the builder. Nothing that occurs during a
9 builder's or claimant's inspection or testing may be used or
10 introduced as evidence to support a spoliation defense by any
11 potential party in any subsequent litigation.

12 (e) (1) Within 14 days following the completion of any
13 inspection or testing set forth above, the builder shall send the
14 claimant one of the following:

15 (A) A written offer to fully or partially remedy the
16 construction defect at no cost to the claimant. The offer shall
17 include a description of any additional construction necessary to
18 remedy the defect described in the claim and an anticipated
19 timetable for the completion of that construction.

20 (B) A written offer to settle the claim by monetary payment.

21 (C) A written offer including a combination of repairs and
22 monetary payment.

23 (D) A written statement that the builder will not proceed
24 further to remedy the defect.

25 (2) Any offer shall be accompanied by a detailed, specific,
26 step-by-step statement identifying the particular defect that is
27 being repaired, explaining the nature, scope, and location of the
28 repair, and setting a reasonable completion date for the repair.
29 The offer shall also include the names, addresses, telephone
30 numbers, and license numbers of the contractors whom the
31 builder intends to have perform the repair. Those contractors
32 shall be insured for, and shall be responsible for, all damages or
33 injuries that they may cause during the repair.

34 (f) If the claimant rejects the builder's offer to remedy the
35 construction defect or to settle the claim by monetary payment,
36 or a combination of the two, the claimant shall send written
37 notice of the claimant's rejection to the builder. The notice shall
38 include the specific reasons for the claimant's rejection of the
39 builder's offer. If the claimant believes the builder's settlement
40 offer is unreasonable, the claimant shall set forth in detail all

1 reasons why the claimant believes the settlement offer is
2 unreasonable.

3 (g) Upon receipt of a claimant's rejection and the reasons for
4 the rejection, the builder may, within 15 days of receiving the
5 rejection, make a supplemental offer of repair or monetary
6 payment to claimant.

7 (h) If the claimant rejects the supplemental offer made by the
8 builder to remedy the construction defect or to settle the claim by
9 monetary payment, or a combination of the two, the claimant
10 shall send written notice of the claimant's rejection to the builder.

11 (i) To accept the builder's offer to remedy a construction
12 defect, the claimant shall send the builder a written notice of
13 acceptance within a reasonable period of time after receipt of the
14 builder's settlement offer, but no later than 30 days after receipt
15 of the offer. If no response is sent to the builder within the
16 30-day period, then the offer shall be deemed accepted.

17 (j) If the claimant accepts the builder's offer to repair a
18 construction defect described in the notice of claim, the claimant
19 shall provide the builder and its subcontractors, agents, experts
20 and consultants prompt and unfettered access to the dwelling at a
21 mutually convenient date and time, to perform and complete the
22 construction by the timetable stated in the settlement offer.
23 Nothing that occurs during the repair process may be used or
24 introduced as evidence to support a spoliation defense by any
25 potential party in any subsequent litigation.

26 (k) If the claimant accepts the builder's offer made pursuant to
27 subparagraph (A), (B), or (C) of paragraph (1) of subdivision (e),
28 and the builder does not proceed to make the monetary payment
29 or remedy the construction defect within the agreed timetable,
30 the claimant may bring an action against the builder for the claim
31 described in the notice of claim without further notice except as
32 otherwise provided by applicable contract or law. The builder's
33 offer and the claimant's acceptance thereof shall create a
34 rebuttable presumption that a binding and valid settlement has
35 been reached and shall be enforced by the court or arbitrator.

36 (l) If the claimant receives a written statement that the builder
37 will not proceed further to remedy the defect, the claimant may
38 bring an action against the builder for the claim described in the
39 notice of claim without further notice except as otherwise
40 provided by applicable law.

1 (m) After the builder receives the claimant's initial notice of
2 claim, the claimant and the builder may, by written mutual
3 agreement, alter the procedure for the notice of claim process
4 described in this section.

5 (n) A builder or subcontractor that has agreed to a repair or
6 settlement under this title and that has notified its insurance
7 carriers according to the terms of its insurance policies, shall be
8 deemed, for insurance purposes, to have been legally obligated to
9 make the repairs or the monetary payment as if the claimant had
10 recovered a judgment against the builder or subcontractor in the
11 amount of the cost of the repairs or the amount of the monetary
12 payment.

13 945.11. (a) If a builder intends to hold a potentially
14 responsible party liable for its contribution to the cost of the
15 repairs or cash payment of the alleged defect actually made
16 pursuant to this title, the builder shall identify and provide notice
17 to that person or entity sufficiently in advance to allow the person
18 or entity to attend either the initial or second inspection or testing
19 of any alleged defect and to participate in the repair process. If a
20 potentially responsible party is notified of the initial inspection,
21 that party also shall be notified of a second inspection, if any.
22 The notice shall be in writing sent by certified mail to each
23 potentially responsible party whose identities are known to the
24 builder or readily ascertainable by review of the project files and
25 whose responsibility appears on the face of the notice received
26 from the claimant by the builder pursuant to Section 945.7. The
27 notice pursuant to this section also shall advise the potentially
28 responsible party that failure to attend the inspection or testing
29 will result in the waiver of its ability to challenge the cost of
30 repairs or cash payment made in settlement. The notice also shall
31 advise the potentially responsible party to notify any of its
32 insurers that may have potential liability for the claim.

33 (b) The notice requirements of this section are satisfied when
34 the builder sends notice to the potentially responsible party as
35 follows:

36 (1) If the potentially responsible party's license is active, using
37 the contact information provided on the Contractors State
38 License Board Web site for subcontractors with an active license.

39 (2) If the potentially responsible party's license is inactive, at
40 the last known address for that subcontractor to the extent

1 indicated on the Contractors State License Board Web site at the
2 time potentially responsible parties are notified.

3 (3) If no contact information is provided for a potentially
4 responsible party on the Contractors State License Board Web
5 site, at the address set forth in the original contract.

6 (c) Any potentially responsible party who had notice, pursuant
7 to subdivision (a), and failed to attend an inspection, shall be
8 bound by the cost of repairs or cash payment made. However, in
9 any subsequent action, the potentially responsible party may
10 introduce evidence as to the allocation of the settlement. A
11 builder may not bind a potentially responsible party to the cost of
12 repairs or cash payment made pursuant to this title if the builder
13 did not provide notice to that party, pursuant to subdivision (a).

14 (d) If a potentially responsible party attends an inspection
15 pursuant to this title, notwithstanding any other rights a builder
16 retains, a builder may not withhold money otherwise due by the
17 terms of a contract to a potentially responsible party to offset the
18 value of repairs or a cash settlement provided pursuant to this
19 title.

20 (e) The claimant shall be advised in a reasonable time prior to
21 the inspection as to the identity of all persons or entities invited
22 to attend. This subdivision does not apply to the builder's
23 insurance company. Except with respect to any claims involving
24 a repair or cash payment, or both, actually made pursuant to this
25 title, nothing in this section may be construed to relieve a
26 potentially responsible party of liability.

27 945.12. Nothing in this title is intended to affect existing
28 statutory or decisional law pertaining to the applicability,
29 viability, or enforceability of alternative dispute resolution
30 methods, alternative remedies, contractual arbitration, judicial
31 reference, or similar procedures requiring a binding resolution of
32 a claim or any other disputes between claimants and builders.
33 Nothing in this title is intended to affect the applicability,
34 viability, or enforceability, if any, of contractual arbitration,
35 judicial reference, or any other form of alternative dispute
36 resolution method after the prelitigation procedure set forth in
37 this title has been completed.

38 945.13. (a) If the applicable statute of limitations would
39 otherwise run during this process, either of the following shall
40 apply:

1 (1) If the builder elects to follow the prelitigation procedure
2 provided in this title, then the time period for filing a complaint
3 or other legal remedies for a violation of any provision of this
4 title, or for a claim of inadequate repair, is extended from the
5 time of the notice of the claim pursuant to Section 945.7 by the
6 claimant to 100 days after the repair is completed.

7 (2) If the builder fails to acknowledge the claim within the
8 time specified, or elects not to go through this statutory process,
9 the time period for filing a complaint or other legal remedies for
10 a violation of any provision of this title is extended from the time
11 of the notice of the claim pursuant to Section 945.7 by the
12 claimant to 30 days after the time for responding to the notice of
13 claim has expired or from receipt of a notice from the builder
14 electing not to follow the procedure.

15 (b) This section does not toll any applicable statute of
16 limitations if the prelitigation procedure is completed prior to the
17 expiration of the applicable statute of limitations.

18 945.14. The filing of an action does not preclude the use of
19 binding or nonbinding arbitration, judicial reference, or any other
20 form of alternative dispute resolution.

21 945.15. If the claimant fails to act in accordance with the
22 requirements of this title within the timeframes required, the
23 builder may bring a motion to stay any subsequent court action or
24 other proceeding until the requirements of this title have been
25 satisfied. The court, in its discretion, may award the prevailing
26 party on the motion, his or her attorney's fees and costs in
27 bringing or opposing the motion. In the event the claimant fails
28 to comply with the notice requirements of subdivision (a) for
29 each claimed defect, any statute of limitations applicable to the
30 claim shall not be tolled or extended under this title.

31 945.16. Subsequently discovered claims shall be administered
32 separately under this title, unless otherwise agreed to by the
33 parties.

34 945.17. Evidence of both parties' conduct during this process
35 may be introduced during a subsequent action, if any. Any repair
36 efforts undertaken by the builder may not be considered
37 settlement communications or offers of settlement, but are
38 admissible in evidence on such a basis.

39 945.18. Nothing in this title may be interpreted to eliminate or
40 abrogate the requirement to comply with Section 411.35 of the

- 1 Code of Civil Procedure or to affect the liability of design
- 2 professionals, including architects and architectural firms.

O